This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 5/13/03.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
JACQUELINE D. YOUNG,	)	
	)	
Complainant,	)	
	)	
and	)	CHARGE NO: 2000SF0774
	)	EEOC NO: 21BA02690
ROBERT QUINTON,	)	ALS NO: S 11625
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before me on Respondent's Motion for Summary Decision filed on October 3, 2002. Complainant filed her response on December 3, 2002 and Respondent replied on December 9, 2002.

Contentions of the Parties

Respondent contends it is entitled to summary decision because there is no genuine issue of material fact between the parties. Specifically, Respondent argues that Complainant's sexual harassment claim is legally insufficient because the allegations are too isolated and tepid. Further, Respondent argues that even if the allegations were legally viable, Complainant's participation in sexually charged discussions at work prevent her from now claiming she was offended by conduct of a similar nature. Finally, Respondent states that Complainant's retaliation claim is legally insufficient because the Illinois Human Rights Act bars retaliation claims against coworkers.

Complainant's position on the legal sufficiency of her Complaint is not known because she failed to address Respondent's arguments in her response. However, Complaint does offer her own affidavit as support that her claim should not be dismissed. I will address both counts of the Complaint separately below.

Findings of Fact

The following facts were derived from the uncontested facts and sworn affidavits in the record and were not the result of a credibility determination:

1. Complainant Jacqueline D. Young was employed by Choice Direct, Inc. as an inserter operator.

2. During her employment with Choice Point Direct, Complainant worked with Respondent Robert Quinton (Quinton), who was a maintenance employee.

3. On April 13, 2000, Complainant, Jacqueline D. Young, filed a charge of discrimination with the Illinois Department of Human Rights alleging Quinton sexually harassed her and retaliated against her for reporting the harassment, which are both acts prohibited by sections 2-102(D) and 6-101(A) of the Act. ***775 ILCS 5/1-101*** *et seq*.

4. On April 9, 2002 the Department filed its First Amended Complaint of Civil Rights Violation against Quinton and alleged he sexually harassed Complainant when:

> a) During the last week in January 2000, [Quinton] stated that he "was going to get a hard on " while trying to squeeze next to co-worker Wendy Snider;
> b) In January 2000, in Complainant's presence, Respondent stated that "he could not give Sonia a massage without getting a hard on;"
> c) On…February 5, 2000, while Complainant and Snider were in the print room, [Quinton] entered and stated "look a chain gang." Snider stated that she smelled something funny and stated [Quinton's] hand "smelled like pussy." Respondent stated "black pussy" and rubbed his fingers together.
> d) On or about March 25, 2000, [Quinton] called Complainant a "crazy f------ bitch;" and
> e) On or about March 25, 2000, [Quinton] called Complainant and another female employee "butt-buddies."
> ***First Amended Complaint, Count I pg. 2***

5. Complainant reported Quinton's behavior to management and later alleged in her Complaint that he retaliated against her because he was made aware of her complaint.

6. Quinton timely filed an Answer to the First Amended Complaint and then filed the present Motion for Summary Decision attacking the legal sufficiency of Complainant's allegations.

Conclusions of law

1. The Illinois Human Rights Commission has jurisdiction over the parties and the subject matter in this case.

2. Complainant is an "employee" within the meaning of section 2-101(A)(1) of Illinois Human Rights Act. ***775 ILCS 5/2-101(A)(1).***

3. Respondent is an "employee" within the meaning of section 2-101(A)(1) of Illinois Human Rights Act. ***775 ILCS 5/2-101(A)(1).***

4. Complainant failed to establish a *prima facie* case of sexual harassment because she failed to establish Respondent's alleged conduct was actionable or even conduct of a sexual nature.

5. Complainant failed to establish a *prima facie* case of retaliation because she failed to present any evidence to rebut Respondent's sworn denial of the retaliation allegations.

Determination

Complainant's Complaint should be dismissed with prejudice because she failed to establish a genuine issue of material fact with respect to either sexual harassment or retaliation.

Discussion

The Illinois Human Rights Act provides that a party is entitled to summary decision "if the pleadings and affidavits…show that there is no genuine issue as to any material fact and that the moving party is entitled to a recommended order as a matter of law." ***775 ILCS 5/8-106.1.*** That particular provision of the Act mirrors the well established procedure followed by the Illinois Circuit Courts. However, a party may overcome a motion for summary decision if she presents relevant, admissible sworn evidence to refute the motion. To determine if a genuine issue of material fact exists in this case, Complainant need not prove her case at this juncture, but she must at least provide enough evidence to show that she can establish a *prima facie* case of sexual harassment at hearing.

Sexual Harassment

The Illinois Human Rights Act defines sexual harassment as "any unwelcome… conduct of a sexual nature when… such conduct has the purpose or effect of creating an intimidating, hostile or offensive working environment." ***775 ILCS 5/2-101(E)***. By definition then, to establish a *prima facie* case Complainant must show that Respondent's conduct 1) was unwelcome, 2) was of a sexual nature and 3) created an offensive working environment, i.e. the conduct was severe or pervasive enough to alter the conditions of her employment. (See, ***Meritor Savings Bank, FSB v. Vinson,*** 477 U.S. 57, 91 L. Ed. 2d. 49, 106 S.Ct. 2399 (1978)).

The Commission has ruled there is no bright line test for determining what type of behavior or conduct leads to liability for sexual harassment. Instead, the Commission has charged the administrative law judge to consider not only what actions arose in the workplace, but how the actions were made in relationship to the "specific behavior of the individuals involved to the total working environment." ***Robinson and Jewel Food Stores***, 29 Ill HRC Rep. 198, 204 (1986).

The seminal case in determining how actions affect the workplace environment as a whole was decided by the United States Supreme Court in the matter of ***Harris v. Forklift Sys., Inc.,*** 510 U.S. 17, 126 L. Ed. 2d 295, 114 S.Ct. 367, 370 (1993). In ***Harris***, the Supreme Court reaffirmed its holding in ***Meritor*** and further ruled that a respondent's conduct must be viewed objectively and subjectively to accurately evaluate the conditions of the work environment. If both standards do not reveal a hostile work environment, then the Act has not been violated. ***Id*** *at 21, 22.; see also,* ***Barlow and Cook County Dep't of Corrections & Michael Figliulo***, ___ Ill. HRC Rep.___, slip op. at 19. (1993CF2498, April 30, 1998). Initially, though, Complainant must show that Respondent's alleged conduct was sexual in nature and rises to a level of hostility so as to be considered actionable conduct. ***Scott v. Sears, Roebuck & Co.,*** 798 F.2d 210 (7th Cir. 1986).

The pleadings and affidavits offered by both Respondent and Complainant do not address whether or not the conduct was sexual in nature, but rather seem to focus on Complainant's subjective view of her working environment. The affidavits address the red-herring argument submitted by Respondent that Complainant could not have been subjectively offended by his conduct because she was a member of an obscure group of employees who referred to themselves as "the non-offended group." Both Respondent and Complainant differ as to the scope of the permitted conduct tolerated by the "non-offended" group, but agree that the group was made up of employees who agreed not to be offended by unconventional workplace behavior. However, the parties' focus on this issue is misplaced. While the issue of Complainant's participation in the group is certainly viable, it is not a material issue for purposes of this motion. The material issue to be addressed is whether Respondent's conduct *objectively* rises to the level of sexual harassment at all, and if it does then was Complainant's work performance affected by the hostile or offensive environment.

The ***Harris*** court provided some guidance to discern whether a workplace is objectively abusive and employed certain factors as a gauge. Those factors have been adopted by the Commission and include: 1) the frequency and severity of the conduct; 2) the threatening or humiliating nature of the conduct; and 3) the interference with the employees work performance. (***Harris***, 114 S.C. at 371; ***Collins v. Owen Health Care et al.,*** ___ Ill. HRC. Rep ___, (1997SF0308, August 24, 1999).

In the present case, a portion of Complainant's allegations amount to a series of indirect comments made in her presence by Respondent to others in the workplace. The Commission previously visited the issue of indirect comments and their *inability* to establish liability for sexual harassment in the case of ***Collins v. Owen Healthcare, Inc et al.,*** ___ Ill HRC. Rep___ , (1997SF0308, August 24,1999). In ***Collins***, the complainant alleged her co-worker, who had previously worked in a pharmacy, made sexual comments in her presence to her and to others including: 1) speculation of

whether or not pharmaceutical customers who purchased birth control would "get lucky;" 2) stated that at the hospital where he once worked a man came in with a "bowling pin stuck up his ass" for sexual gratification; 3) called pharmacy technicians he once worked with "whores and prostitutes;" 4) told the complainant's co-worker, "look out; my pants are unzipped;" and, 5) described a friend's episiomoty procedure as "being cut from her pussy to her ass." (***Collins***, Slip op. at 6.)

The complainant in ***Collins*** alleged that the Respondent sexually harassed her with his comments, but the Commission applied the ***Harris*** factors and disagreed because Complainant was not the *direct* recipient of most of the comments. In applying the factors, the administrative law judge found that the indirect comments that Complainant overheard, or that were told to her about others, were too indirect to be considered severe enough to constitute an alteration of her work environment. (***Collins***, slip op. at 17.)

The present case is similar to ***Collins*** because Respondent's comments here that "he was getting a hard on", "look a chain gang," and "black pussy" are also indirect comments that were not made to Complainant but were made in her presence. In fact, according to Complainant's First Amended Complaint, the allegation containing Quinton's "black pussy" comment was initiated by Complainant's female co-worker, Wendy Snider, when *Snider* commented, in Complainant's presence, that Quinton's hand "smelled like pussy." Quinton then responded "black pussy." Granted that type of indirect office banter made in Complainant's presence was boorish, but I would be hard pressed after a hearing to say Quinton's comments or participation were severe, threatening, or humiliating to Complainant. As the ***Collins*** judge observed, "the comments did not pertain to physically threatening or humiliating conduct. Thus, this is not a situation where the harassment was directed at Complainant or caused her to be physically threatened or personally humiliated." (***Id*** at 17.) Here, as in ***Collins***,

Respondent's indirect comments made in Complainant's presence do not create a triable issue for hearing as a matter of law and must be dismissed.

The remaining allegations of sexual harassment involve comments made directly to Complainant. Specifically, that Respondent called Complainant a "crazy f------ bitch" and, called Complainant and her co-worker "butt-buddies." These comments *were* directed at Complainant, so the analysis must focus on whether or not they were sexual in nature. The Commission has held that in order for conduct to be considered sexual in nature "it must be conduct that fosters a sense of degradation in the victim…in that the victim is inferior 'because of' [her] sex." (***Collins*** slip op. at 15 citing, ***Ford v. Caterpillar Inc.,*** ___ Ill. HRC. Rep ___, (1993SF0240, October 28, 1996).

The allegation that Respondent called Complainant a "crazy f------ bitch," could never degrade a woman "because of" her sex. The Commission has previously adopted the federal court's view that, " [i]n its normal usage,[the word 'bitch'] is simply a pejorative term for ' woman,'" in that it does not connote some sexual characteristic which would cause women to feel inferior to men in the workplace. ***Allen v. Mundelein Park District,*** ___ Ill HRC. Rep. ___, (1995CF0836, October 20, 1999) *citing*, ***Galloway v. General Motors Service Parts Operation****,* 78 F3d 1164, 1168 (7th Cir. 1996). In other words, Respondent's use of the phrase "crazy f----- bitch" does not present a triable issue for hearing because it was more than likely evoked out of anger toward Complainant or from his general dislike of her.

Finally, there is a strong argument to be made that the term "butt-buddies" is gender specific, but usually the use of that particular slang term evokes degradation to males rather than females. While this conduct can be viewed certainly as inappropriate sexual teasing, it was not directed toward Complaint "because of " her gender. It is not actionable because it is not "anti-female." It does not "perpetuate a stereotype of women being inferior to men or being useful only as sex objects." (***Collins*** slip op at 16.)

Retaliation

Respondent further submits that the retaliation count in the First Amended Complaint should be dismissed as a matter of law because the Human Rights Act does not recognize retaliation claims against individual Respondents. This argument is erroneous. Section 6-101(A) explicitly states that "it is a civil rights violation for a *person*…to retaliate against a person because…she has opposed what…she reasonably and in good faith believes to be unlawful discrimination." ***775 ILCS 5/6-101(A).*** The definition of "person" in section 1-103 of the Act specifically includes "one or more individuals." Thus, based on the plain meaning of section 6-101(A) and 1-103, an individual respondent can be held liable for retaliation. The more relevant issue for purposes of this motion is: Can Complainant establish a genuine issue of material fact in order to proceed to hearing on her allegation of retaliation?

Here, Respondent admits in his affidavit that he was aware of Complainant's allegations of sexual harassment, but denies the allegations of retaliation contained in count II of the First Amended Complaint. Specifically, that he: 1) cut in front of Complainant in her automobile and caused her to swerve lanes; 2) stared at Complainant and gave her "dirty looks;" 3) every weekend stared at Complainant; and, 4) twice flattened Complainant's car tires. (*See*, Ex. 7 attached to Respondent's Memorandum in Support of Motion for Summary Decision).

Although, Respondent's affirmations must be construed liberally, Complainant does not attempt to counter or even address the retaliatory acts at all in her affidavit attached to her Response to the Motion for Summary Decision. Unfortunately for Complainant, the pitfall surrounding the use of affidavits lies in the notion that any facts supported in an affidavit that are not contradicted by a counteraffidavit are admitted and must be taken as true for purposes of a Motion for Summary Decision. ***Purtill v. Hess,*** 111 Ill2d. 229, 489 N.E.2d 867, 871-872, 95 Ill.Dec. 305 (1986). Therefore, the statements Respondent made in his affidavit are now deemed admitted and must be

taken as true. Respondent's affidavit establishes that he did not commit any of the acts of retaliation that Complainant has alleged, and "[e]ven though the complaint and answer may purport to raise issues of material fact, if such issues are not further supported by evidentiary facts through affidavits or such, summary judgment is then appropriate." ***Carruthers v. Christopher & Co***., 57 Ill. 2d 376, 380, 313 NE.2d 457, 459 (1974).

In this case, Respondent filed a well grounded motion for summary decision and attached to it sworn affidavits. The motion and affidavits establish there is no genuine issue of material fact between the parties with respect to Complainant's claims and that the case must be dismissed.

Recommendation

Based on the above findings of fact and conclusions of law, I recommend that the Illinois Human Rights Commission dismiss with prejudice the Complaint, together with underlying charge number 2000SF0774 against Respondent.

ILLINOIS HUMAN RIGHTS COMMISSION

KELLI L. GIDCUMB
Administrative Law Judge
Administrative Law Section

ENTERED THE 7TH DAY OF FEBRUARY, 2003.